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May 13, 2002

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station, 2<sup>nd</sup> Floor  
Boston, MA 02110

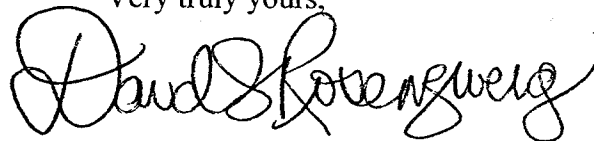
Re: Franklin W. Olin College of Engineering, D.T.E. 01-95

Dear Ms. Cottrell:

I have enclosed an original and three (3) copies of Boston Edison Company's Reply Brief in the above-referenced proceeding.

I have also enclosed a Certificate of Service. Thank you for your attention to this matter.

Very truly yours,



David S. Rosenzweig

Enclosure

cc: Robert Hayden, Hearing Officer  
Shashi Parekh, Electric Power Division  
Paul Afonso, General Counsel  
Ronald LeComte, Director, Electric Power Division  
William Stowe, Esq.  
Eric Krathwohl, Esq.  
Robert Richardson, Esq.  
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Donald Hillman, Esq.

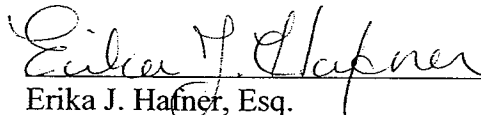
**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Franklin W. Olin College of Engineering  
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D.T.E. 01-95

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing document upon the Department of Telecommunications and Energy, and counsel for all parties, by hand or first class mail, in accordance with the requirements of 220 C.M.R. 1.05 (the Department's rules of Practice and Procedure).

  
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Dated: May 13, 2002

**COMMONWEALTH OF MASSACHUSETTS**  
**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Franklin W. Olin College of Engineering

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D.T.E. 01-95

**REPLY BRIEF**  
**OF**  
**BOSTON EDISON COMPANY**

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Dated: May 13, 2002

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COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Franklin W. Olin College of Engineering )  
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D.T.E. 01-95

REPLY BRIEF OF BOSTON EDISON COMPANY

I. INTRODUCTION

In accordance with the procedural schedule in this case, Boston Edison Company, d/b/a NSTAR Electric (“Boston Edison” or the “Company”) files its Reply Brief. This Reply Brief responds to the initial briefs of Franklin W. Olin College of Engineering (“Olin”) and the Wellesley Municipal Light Plant (“WMLP”)<sup>1</sup> filed on May 6, 2002, regarding Olin’s Petition before the Department of Telecommunications and Energy (the “Department”) seeking a declaratory ruling or, alternatively, approval pursuant to G.L. c. 164, § 47A(d), that it may obtain its electric service from WMLP. Boston Edison will not repeat each argument it made in its Initial Brief, nor will it restate every argument made by the other parties in this proceeding. In the sections that follow, Boston Edison addresses only those arguments by Olin and WMLP to which Boston Edison believes further response is warranted.<sup>2</sup>

As stated in Boston Edison’s Initial Brief, this is a simple case and, based on what is left of Olin’s and WMLP’s assertions after the filing of initial briefs, the issues in this case have become even simpler. Consistent with their “moving target” modus operandi throughout this

<sup>1</sup> References to the briefs of other parties will be made herein using the convention of the name of the applicable entity followed by “Initial Brief.”

<sup>2</sup> Boston Edison also does not intend that its silence concerning any matter reflects agreement with positions taken by any parties in this proceeding. To the contrary, Boston Edison reasserts the positions and arguments made in its Initial Brief.

case, Olin and WMLP have substantially retreated from their initial claims regarding the significance of the 1,000 square-foot parcel of land and the interrelationship between Babson College (“Babson”) and Olin as bases for the Department finding in their favor. Instead, Olin’s and WMLP’s “house of cards” hinges on the Department concluding that Lot 2 on the Olin campus (which first came into legal existence as a “lot” in the latter part of 1999) was part of WMLP’s “service territor[y] actually served on July 1, 1997,” pursuant to G.L. c. 164, § 1B(a). In addition, Olin and WMLP argue extensively in their initial briefs about the relative costs and reliability of receiving service from WMLP versus Boston Edison. For the reasons discussed below, Olin’s and WMLP’s arguments on these issues fail to overcome the dispositive facts and law in deciding this case, which are: (1) that Olin is located in Needham; (2) that Boston Edison holds the exclusive franchise right to serve customers in Needham, including Olin; and (3) that issues of cost and reliability are not relevant to the determination of a distribution company’s franchise rights.

Despite extensive argument, Olin and WMLP have not shown that WMLP ever “actually served” Lot 2 in Needham or that any service to Lot 2 would permit WMLP to expand its service territory into Needham. Indeed, it was Babson, through its own internal distribution system, and as a straddling customer uniquely located in both Wellesley and Needham, that served itself on Lot 2. Such provision of service by Babson to parts of its own campus is lawful and does not alter the service territory boundaries of either Boston Edison or WMLP. See Massachusetts Electric Company, D.T.E. 98-122, at 9 (2002) (hereinafter “Mass. Elec.”). In fact, the record reflects that, as of July 1, 1997, WMLP had no facilities or equipment located in Needham and that it had no permission to provide electric service in this area of Needham. Moreover, for WMLP to have “actually served” these light poles on Lot 2, WMLP would have required consent

from Boston Edison, authority from Needham and/or Wellesley, and approval pursuant to G.L. c. 164, § 47 to extend lines into the adjoining town of Needham; such consent or approvals were never sought nor obtained with regard to Lot 2.

Alternatively, even if the service to these few light poles is found to be actual service from WMLP, such prior service was so miniscule and so geographically limited that it cannot support altering Boston Edison's service territory from the Needham-Wellesley municipal boundary. The character of this service has also changed so substantially with the advent of Olin, in that the land has been deeded to a different entity, the end user of the electricity has changed, and the actual use of the electricity has been expanded dramatically, that any "actual service" that WMLP may have provided historically to Babson as a straddling customer on Lot 2 is not comparable to the service that Olin receives today. Therefore, such past service to a group of light poles on Lot 2, which were removed prior to the transfer of the property to Olin, does not justify deviating from municipal boundaries in determining franchise areas or permitting WMLP to encroach into Boston Edison's service territory.

Despite Olin's and WMLP's belabored comparisons of the cost and reliability of service between Boston Edison and WMLP, such issues are simply irrelevant to the discrete legal issue in this case. Also, Olin and WMLP repeatedly mischaracterize the record on these issues and insist on making inapt comparisons between service from WMLP and Boston Edison. Although issues of cost and reliability are matters that undoubtedly may be considered by customers who have the right to choose their distribution company, Olin and WMLP have failed to demonstrate that Olin is such a customer. Accordingly, their protracted discussions of cost and reliability are not relevant to the Department's determination in this matter.

As the Petitioner in this case, Olin (and WMLP as a supporter of Olin's position) must bear the burden of demonstrating that, in defining distribution company franchises, WMLP's provision of service to Olin falls within the ambit of G.L. c. 164, § 1B(a) and that it is sufficient to overcome the legislative mandate to follow municipal boundaries to the extent possible. See G.L. c. 164, § 1B(a). Based upon the applicable facts and law, Olin has not, and indeed, cannot meet this burden. Therefore, Olin's Petition should be denied and the Department should determine that Boston Edison is the only distribution company authorized to provide service to Olin, in that the Company has the exclusive franchise right to serve electricity customers in Needham.

## **II. ARGUMENT**

### **A. The Prior Service to a Group of Light Poles on a Small Portion of Lot 2 Does Not Constitute Actual Service Under G.L. c. 164, § 1B(a).**

In reviewing franchise border disputes, the starting point for the Department's analysis is the legislative mandate to grant distribution companies exclusive franchise rights following municipal boundaries to the extent possible.<sup>3</sup> G.L. c. 164, § 1B(a). The justification offered by WMLP and Olin to support service to the Olin campus has continuously evolved and been a

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<sup>3</sup> The discretion accorded the Department in this area reflects the General Court's awareness in 1997 of the historical "patchwork quilt" of service territories in the Commonwealth. Mass. Elec., D.T.E. 98-122, at 6. In general, the boundaries of service territories precisely follow municipal boundaries, but, as the Department and the General Court were well aware, this is not always the case. For instance, in several communities in Massachusetts, more than one distribution company is authorized to provide service: on the electric side, Bellingham (Massachusetts Electric Company ("Mass. Electric") and Boston Edison); Hancock (Mass. Electric and Western Massachusetts Electric Company ("WMECo")); Cheshire (Mass. Electric and WMECo); Lenox (Mass. Electric and WMECo); and Dighton (Mass. Electric and Taunton Municipal Light Plant); and on the gas side, Bellingham (Bay State Gas Company and Blackstone Gas Company); Boston (Boston Gas Company and NSTAR Gas Company); and Lunenburg (Boston Gas Company and Fitchburg Gas & Electric Light Company). However, absent unusual circumstances, the statutory mandate to the Department is to enforce franchise areas, as they existed on July 1, 1997, along municipal boundaries. G.L. c. 164, § 1B(a).



moving target throughout this proceeding.<sup>4</sup> Indeed, at the outset, Olin's Petition was based solely on receiving service on the 1,000 square-foot speck of land in Wellesley, within WMLP's service territory. Next, after having appreciated the Department's prohibition against creative conveyancing, Olin transitioned its position, premising its argument upon some notion of a close working relationship between it and Babson, implying that Olin and Babson should be considered a single customer.<sup>5</sup> Mass. Elec., D.T.E. 98-122, at 11.<sup>6</sup> Also, at this time, Olin touted the prospect of potential, future land conveyances and facility development that may occur jointly between Olin and Babson on property located in both Needham and Wellesley. However, when the facts underlying these two positions were subjected to scrutiny on cross-examination during hearings, Olin and WMLP shifted their argument again, this time focusing on the

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<sup>4</sup> Olin and WMLP have generally alleged that Boston Edison does not have an exclusive franchise right to serve in Needham (Olin Initial Brief at 8-9; WMLP Initial Brief at 10). Such a claim is baseless because, pursuant to Chapter 164 of the Acts of 1997, An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein (the "Act"), exclusive franchise rights were granted to all distribution companies according to the service territories they served on July 1, 1997. G.L. c. 164, § 1B(a). The Department has incorporated those franchise rights of Boston Edison and other distribution companies in the Commonwealth through its regulations. 220 C.M.R. 11.02.

Further, Olin and WMLP mischaracterize the importance of a series of agreements dating back to the early 1900's regarding electric service within Needham by Boston Edison and its predecessors (WMLP Initial Brief at 10-12; Olin Initial Brief at 8-9). The Company presented these agreements not to establish that it had an exclusive franchise, but to demonstrate that it had a long-standing and substantial history of providing electric service in Needham (Boston Edison Initial Brief at 15-16). For its part, WMLP has acknowledged that it has no such agreements or authorization from Needham to serve within the town (see Exh. BE-1, at 8-10, 13; see also Tr. 2, at 213).

<sup>5</sup> Both Olin and WMLP make the suggestion that, if Lot 2 were still under the ownership of Babson, there would be no question that WMLP would be authorized to serve that portion of the campus (Olin Initial Brief at 11; WMLP Initial Brief at 17). Indeed, that may be true, but it proves just the opposite conclusion. The fact is that Olin and Babson are completely separate entities (i.e., Olin and Babson are distinct colleges and did not merge themselves as "Olson College" or "Babin College"). Unlike Babson, Olin is not a straddling customer, it owns its land separately from Babson and it is exclusively located in Needham. In any event, Olin filed its Petition alone seeking service from WMLP, and Babson is not a co-petitioner or, at this point, even a party to the proceeding. Therefore, there is no basis to consider Olin and Babson as one and the same customer (Boston Edison Initial Brief at 35-37).

<sup>6</sup> Both Olin and WMLP in their initial briefs place great reliance on the Department's decision in Ecological Fibers, Inc., D.P.U. 85-71 (1985) (Olin Initial Brief at 14, 42, 46; WMLP Initial Brief at 22, 28). Their reliance is off the mark. As the Department stated in Massachusetts Electric Company, its prior order in Ecological Fibers, Inc. predates the current legislative policy set forth in G.L. c. 164, § 1B(a) and the establishment of exclusive franchise rights therein. D.T.E. 98-122, at 11 n.8.

historical service to a group of Babson's light poles formerly located on a small corner of what is currently referenced as "Lot 2." For the reasons set forth below, Olin's and WMLP's reliance on the Lot 2 argument is equally without merit and should be rejected by the Department.

1. There Was No Actual Service to Lot 2 by WMLP.

It is uncontested in these proceedings that Babson maintains its own internal distribution network over which it distributes electricity throughout its campus in Wellesley and Needham (see, e.g., Exh. WMLP-1, at 2-3). This includes Babson-owned conduit, poles, wires, meters, switchgear, etc. that services Babson-owned property (see *id.*). Babson receives its supply at a point of interconnection with WMLP on the Babson campus in Wellesley (see *id.*; Tr. 2, at 245). Babson then delivers this power throughout its campus, including to the small portions of its campus that are located in Needham (Exh. WMLP-1, at 2-3; Tr. 2, at 245). It is in this manner that Babson provided service to the group of light poles that were formerly located on Lot 2 in Needham (Exh. WMLP-1, at 2-3; Tr. 2, at 245). Significantly, with the sale of the Olin campus property to Olin, all of these lighting facilities on Lot 2 have been removed (Tr. 2, at 237-238, 243). Similarly, temporary service to the Olin campus is also provided in this way (Tr. 2, at 238), although it should be noted that such temporary service presently terminates on Lot 5 of the Olin campus (Exh. BE-ARJ-4).<sup>7</sup>

The full extent of WMLP's role in providing service to Lot 2, both in the past and currently, is WMLP's interconnection with Babson switchgear at a location on the Babson

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<sup>7</sup> Boston Edison continues to believe that Babson's role in providing temporary service to Olin is not in accordance with G.L. c. 164. However, the Company also recognizes the late stage of this proceeding and, as a practical matter, its request for preliminary relief is now essentially moot. In this case, Boston Edison's primary interest is for the Department to issue an order expeditiously that confirms the Company's right to serve Olin as a customer located in Needham. Accordingly, Boston Edison will not press its outstanding motion in relation to the temporary service to the Olin campus, on the assumption that, following the Department's final decision in this case, all parties will move expeditiously to implement the Department's determinations.

campus in Wellesley (id.; Exh. WMLP-1, at 2-3). Historically and currently, WMLP has had no facilities of any kind on Lot 2 for the provision of distribution service to Babson or Olin, nor has WMLP had any facilities at all in Needham serving Babson or Olin. Also, WMLP has admitted that it does not know specifically when service to those light poles in Needham began or when those poles were removed – information an actual service provider should be reasonably expected to know (see WMLP Initial Brief at 7).<sup>8</sup> Further, WMLP does not currently have any equipment or facilities located on the Olin campus for the provision of temporary distribution service. Indeed, all such equipment and facilities are owned by Olin and/or Babson (Exh. BE-ARJ-4).

WMLP never had facilities on Lot 2 for the distribution of electricity, and for WMLP to have lawfully had such equipment or facilities on Lot 2 in Needham, it would have first needed to secure Department approval. See G.L. c. 164, § 47. Specifically, the Department may allow a municipal lighting plant “to extend its mains or lines into an adjoining town in order to distribute and sell gas or electricity therein, if such town or a private corporation therein is not then supplying such town with gas or electricity, as the case may be.” Id. Therefore, for WMLP to have legally served Lot 2 in Needham prior to the Act, WMLP would have had to obtain Department approval by demonstrating that Needham was not being supplied with distribution

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<sup>8</sup> Similarly, although all other parties have been clear on the issue, WMLP seems to lack knowledge regarding the exact location of the temporary lights currently located along Map Hill Road and, specifically, whether these lights are on Olin or Babson property (Tr. 6, at 827-828). Notwithstanding a site walk, testimony from Mr. Hannabury (Tr. 1, at 72-73) and testimony from Mr. Jessa (Tr. 4, at 665-666), confirming the location of the temporary lights as being not on Olin’s property (but on Babson’s property), Mr. Joyce expressed “uncertainty” as to whether these temporary lights were located on Olin or Babson property (Tr. 2, at 239-240, 250). Despite a record request from the Company to verify this fact (Tr. 2, at 250), and several additional requests for this information on the record (see, e.g., Tr. 6, at 827-828) (not to mention off the record), WMLP failed to provide a response to this record request. This is curious because, for other purposes (see Exhs. WMLP-2 Att.; WMLP-8; IR-BE-1-8A Supp.), WMLP has been able to cobble together information that was neither requested nor authorized in an attempt to support its position(s).

service by either its own municipal lighting plant or a private corporation. See id. Not only did WMLP not seek such approval from the Department, such approval would have been impossible for WMLP to obtain because Boston Edison, a private corporation, was, at all times since the early 1900's, providing distribution service within Needham (see, e.g., Exh. IR-BE-1-4 Att.). See id.

Based upon the above facts, Babson, and not WMLP, is the entity that distributed power to Lot 2 in the past. Because WMLP has never had any facilities or equipment for the distribution of electricity on any part of the Babson campus in Needham,<sup>9</sup> it is impossible for WMLP to have provided actual distribution service to the group of light poles on Lot 2 in Needham when that property was owned by Babson. Therefore, Babson is the entity that physically provided distribution service to itself on Lot 2 in the past, and currently provides temporary service to the Olin campus. As a result, Lot 2 was never "actually served" by WMLP and this area of Needham cannot be considered part of WMLP's service territory. G.L. c. 164, § 1B(a).

Not only was Babson the entity that had "actually served" Lot 2, as a straddling customer, such service was both lawful and proper, and cannot serve as a basis for WMLP's claim that Lot 2 is within its service territory. Indeed, Babson's practice of receiving power from WMLP at a point in Wellesley and delivering that electricity over its own internal distribution network to other areas of the Babson campus is exactly the kind of customer conduct that the Department has found to be legal. The Department has stated, "once electricity is delivered (i.e., been sold) to a customer, it is his lawfully to use as he wishes on his metered premises." Mass.

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<sup>9</sup> Consistent with Mr. Berdan's testimony in Wellesley Department of Public Works, D.P.U. 86-45/86-144 (1986), the record in this case reflects that WMLP has no rights, special acts of the Legislature, votes of Wellesley Town Meeting or grants of location permitting WMLP to provide electric service in this area of Needham (Exh. BE-1, at 8-10, 13; see also Tr. 2, at 213).

Elec., D.T.E. 98-122, at 9. Thus, the Department has explicitly determined that a customer may deliver electricity from one portion of its property to another, even if the property lies in two different municipalities and in two separate service territories. Id.

The ability of a customer to use electricity throughout a piece of property located in two municipalities does not alter the service territory boundaries of the respective distribution companies. The facts in Massachusetts Electric Company are instructive. In that case, the customer at issue, a Stop & Shop supermarket, was located on an 11-acre parcel, and both the structure and the parcel straddled the municipal boundary between the Town of Salem (“Salem”) and the Town of Peabody (“Peabody”). D.T.E. 98-122, at 1. Similar to the facts in the case of Babson and Olin, distribution service for the Stop & Shop property was received from the municipal light department, Peabody Municipal Light Plant (“PMLP”), through a customer-owned underground primary circuit on the portion of the parcel located in Peabody. Id. at 2. Based on these facts, the Department found that the customer had a right to deliver its electricity, once purchased from a distribution company, throughout its property and over municipal and service territory boundaries. Id. at 8. Further, the Department explicitly gave the customer the right to choose which distribution company could serve its entire parcel. Id. The service territory boundaries of PMLP and Mass. Electric did not change as a result of the Department’s order; instead, in keeping with the Department’s intent to focus on the customer in franchise disputes, in Massachusetts Electric Company, the Department granted the customer the right to deliver its electricity over a service territory boundary, and did not alter the service territory boundaries of the respective utilities.

Ironically, Olin’s and WMLP’s current Lot 2 argument contradicts at least three of their other positions in this case. First, if it is so clear, as stated in the WMLP Initial Brief (see

WMLP Initial Brief at 4-9), that WMLP “actually served” Lot 2, has always served Lot 2 and has considered Lot 2 to be part of its own service territory for decades, then WMLP’s uniform insistence on receiving Department approval before establishing a connection to serve Olin (see, e.g., Exh. IR-BE-1-8A Att.) cannot be reconciled.

Second, the Lot 2 argument runs completely afoul of WMLP’s and Olin’s persistent statements that, with regard to the temporary service, WMLP has not been providing service to Olin (Tr. 2, at 238-239). WMLP’s alleged prior service to the Babson light poles in Needham was supplied through the central distribution point on the Babson campus in Wellesley (Exh. WMLP-1, at 2-3; Tr. 2, at 238-239, 245). Not surprisingly, the supply for Olin’s current temporary service is delivered by WMLP to that exact same central distribution point on the Babson campus in Wellesley (Exh. WMLP-1, at 2-3; Tr. 2, at 238-239, 245). In fact, in both instances, the supply is received at this location in Wellesley by Babson and then distributed by Babson’s internal facilities to points in Needham (Exh. WMLP-1, at 2-3; Tr. 2, at 238-239, 245). If WMLP’s provision of temporary service through Babson’s distribution facilities located in Wellesley to Olin’s campus in Needham is not, as WMLP has maintained, service outside of its Wellesley service territory, then there is no way WMLP or Olin can explain how WMLP “actually served” Babson’s light poles on Lot 2 through a connection with Babson’s distribution network in Wellesley.

Third, Olin’s and WMLP’s Lot 2 argument is predicated on the notion that only Lot 2 is at issue in this proceeding, a position that is completely at odds with Olin’s Petition in this case. As stated in the Boston Edison Initial Brief, Olin’s Petition was not limited to Lot 2, nor was there any mention of Lot 2 or any restriction placed on Olin’s request to be served by WMLP (Boston Edison Initial Brief at 23-28). In addition, there was no formal action taken by Olin or

WMLP to amend the Petition in that respect. Olin's and WMLP's attempts to limit the scope of the Department's decision to Lot 2, first introduced during hearings, were borne out of necessity (Tr. 3, at 315). Indeed, when the Department issued its D.T.E. 98-122 order in February, Olin evidently realized that its 1,000 square feet in Wellesley would not suffice as a legal basis for receiving service from WMLP (because the transfer of this parcel smacked, apparently even to Olin, of "creative conveyancing"). See Mass. Elec., D.T.E. 98-122, at 11. Because the 1,000 square feet was the entire factual predicate upon which Olin's Petition was based, Olin and WMLP quickly adjusted their theory in the case, promoting various new bases as support for their position,<sup>10</sup> and, in the end, have seized upon the prior existence of Babson's light poles on a corner of Lot 2 as the sine qua non for their legal argument.

There is no factual basis for separating the Olin campus into separate lots and using these lot designations to determine the service territory boundaries of WMLP and Boston Edison. Indeed, Olin is a single 3.2 million square foot parcel that is composed of six lots (Exh. IR-BE-1-1A Att.). Of these six lots, Boston Edison has historically served five (Tr. 1, at 66-67; Exh. BE-ARJ-4). In addition, until the development of the Olin campus, the area that is now Lot 2 was vacant, containing only a parking lot, an access road and about a dozen light poles. As can be seen by reference to the deed of land from Babson to Olin, Lot 2 consists of both registered and unregistered land and was formed during the latter part of 1999 pursuant to a subdivision plan approved by the Needham Planning Board in part (with regard to the unregistered land) on September 7, 1999, and in part (with regard to the registered land) on December 14, 1999 (Exhs. IR-BE-1-1A Att.; IR-BE-1-4 Att.). Accordingly, Lot 2 did not even exist on July 1, 1997, the

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<sup>10</sup> As discussed previously, these new arguments included: a renewed emphasis on Olin's relationship with Babson in an effort to have the two colleges perceived as a single customer and suggesting the possibility of potential joint buildings in Needham and Wellesley that the two colleges may develop in the future.

date upon which service territory boundaries were determined by statute. Since Olin's future development may not be limited to Lot 2, WMLP has stated that, if granted permission to serve Lot 2, it would then view itself as having some right to serve the adjoining Lot 5, and the remainder of the Olin campus in Needham (Tr. 3, at 315-316). Thus, the facts in this case weigh heavily against separating the lots on the Olin campus into discrete parcels for the purpose of determining franchise rights.

In addition, there is no legal basis for subdividing the Olin campus into lots and rendering a decision regarding service territory franchise rights based upon only a single lot. Indeed, G.L. c. 164, § 1B(a) makes reference only to the "service territories" actually served by distribution companies on July 1, 1997, applying municipal boundaries "to the extent possible." There is no mention of lot designations, or other means, of determining franchise boundaries. Further, there is no Department precedent supporting the argument that service territory determinations should be made on the basis of a small lot designation within an overall larger parcel. Moreover, lot designations are subject to frequent variation and under the control of the property owner, as evidenced by this case. As stated above, Lot 2 was created in 1999 as the result of a subdivision plan proffered by Olin (Exhs. IR-BE-1-1A Att.; IR-BE-1-4 Att.).<sup>11</sup> Allowing service territories to be defined by a device subject to such manipulation would only encourage "creative conveyancing," which the Department has attempted to prohibit. See Mass. Elec., D.T.E. 98-122, at 11. This would not promote certainty or clarity, and would not represent sound regulatory policy.

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<sup>11</sup> The references to Lot 2 in the deed provided by Olin in this case are, themselves, quite confusing, identifying two separate Lot 2s, and a registered and unregistered portion of one of the Lot 2s (Exh. IR-BE-1-4 Att. (including the deed and Exhibit A, therein)). Clearly, there has not been a sufficient identification of Lot 2 in the record to enable the Department to make a determination on this basis, even assuming it were inclined to do so.



Massachusetts courts have defined a “lot” as “a parcel of contiguous land owned by one owner or entity, regardless of the individual lots that make up the parcel, and of how each was acquired.” Mass. Practice 28 § 23.5 Construction of Zoning By-Laws--What Is a Lot? See, e.g., Alley v. Building Inspector of Danvers, 354 Mass. 6 (1968); DiCicco v. Berwick, 27 Mass. App. Ct. 312 (1989). In addition, the Subdivision Control Law defines “lot” as “an area of land in one ownership, with definite boundaries, used, or available for use, as the site of one or more buildings.” G.L. c. 41, § 81L; Mass. Practice 28 § 23.5 Construction of Zoning By-Laws--What Is a Lot? Therefore, the important designation for property in Massachusetts is its ownership, and not the internal lot division contained within the particular parcel. Thus, the Olin campus should be legally viewed as a single parcel because it is owned by a single entity and the Department should not countenance Olin’s and WMLP’s efforts to creatively subdivide the Olin campus on the basis of lot designations.

2. The Level of Prior Service to Lot 2 Was So Small and the Character of Such Service Was So Different From the Current Service Sought for the Olin Campus, That Such Prior Service Does Not Constitute a Basis for Deviating From Municipal Boundaries in Defining Service Territories.

Even if the Department were to determine that WMLP “actually served” Lot 2 by indirectly supplying a group of light poles formerly located there, such limited service cannot serve as the basis for WMLP’s provision of service to Olin’s 70-acre campus. Indeed, the past service to light poles on a small portion of Lot 2 was limited in scope and size. The scope of service provided to those lights poles is not comparable to the ultimate 4 megawatts (“MW”) that Olin may potentially require upon full build-out (Tr. 1, at 22). As opposed to approximately a dozen light poles that were located on a small portion of Lot 2, now the Olin campus represents a substantial development with multiple large buildings that house classrooms, laboratories, dormitories and administrative facilities that are spread out over 3.2 million square feet (Exh. IR-

BE-1-1A Att.). Moreover, it bears noting that the light poles formerly located on Lot 2 were removed before Olin began construction of its campus and before the property was officially deeded to Olin by Babson (Tr. 1, at 72; Tr. 2, at 237-238, 243; Tr. 5, at 703).

With regard to the size of the parcel served, these light poles were located only on the portion of Coleman parking lot that extended into Needham and along the former location of Map Hill Drive. In total, the area covered by these poles was, as near as Boston Edison can determine, approximately 65,000 square feet, or only 4.3 percent of the entire area of Lot 2, and only 2 percent of the area of the more than 3.2 million square-foot campus (Exh. IR-BE-1-1A Att.). Although perhaps one, or possibly two, of Olin's buildings currently under construction are located on the same spot as one (or two) of the previous light poles (see Exh. WMLP-2 Att.),<sup>12</sup> the vast majority of the buildings now under construction are not located where these light poles previously existed (id.; Exh. IR-BE-1-1A). And there is no guarantee from Olin that the construction of any future buildings will be limited to this area of Lot 2 where the prior service existed, or even to Lot 2 itself. Indeed, at present, Olin has assembled temporary academic and residential facilities on the southern portion of Lot 5, which is over 1,050 feet from the prior service to Lot 2 (Exh. IR-BE-1-1A Att.).

In addition, the character of the service to the light poles that used to be located on Lot 2 of the Babson campus has changed significantly. Specifically, the land was deeded from Babson to Olin and the property was subdivided into six lots (Exh. IR-BE-1-4 Att.). Prior to the sale of the campus, and before the construction currently occurring on Lot 2, the light poles, and any of Babson's other distribution facilities formerly located on Lot 2, were removed (Tr. 1, at 72; Tr.

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<sup>12</sup> Counsel for Olin has made reference to the fact that WMLP has served the very same "square inch" of property where Olin's buildings now stand (Tr. Procedural Conference, at 36). Given the sheer size of Olin's buildings, especially in comparison to the one or two light poles which they overlap, counsel for Olin was not far off when he made reference to the "square inch" of service.

2, at 237-238, 243; Tr. 5, at 703). The electricity on Lot 2 is no longer used to supply a group of light poles, but instead is being used to construct an undergraduate engineering college that will eventually have approximately 650 students (Tr. 1, at 23). Most importantly, given the sale of this property to Olin, Lot 2, located entirely in Needham, has lost the essential characteristic of being part of a larger land ownership by a customer that straddles a municipal boundary (Exh. IR-BE-1-1A Att.). Accordingly, electric service on Lot 2 is no longer distributed by Babson for its own use on its own property. Instead, the service by Lot 2 is provided by Babson for Olin's use on Olin's property in a separate municipality.

Based upon the above, the amount, location and character of the service currently being used on Lot 2 is not recognizable as the same service provided to the group of Babson light poles that used to exist on a portion of Lot 2. Olin and WMLP should not be permitted to expand the de minimus amount of service that was historically received on a portion of Lot 2 into a new 4 MW customer, thereby materially altering Boston Edison's service territory boundaries.

**B. Issues of Cost and Reliability Are Not Relevant to the Determination of a Distribution Company's Service Territory.**

Both Olin and WMLP focus significant portions of their initial briefs addressing contentions that WMLP has lower rates than Boston Edison, that the cost to interconnect Olin to the WMLP system is less than it is to interconnect Olin to the Boston Edison system and that the WMLP system is inherently more reliable than the Boston Edison system (Olin Initial Brief at 15-21; WMLP Initial Brief at 21-29). In addition, a significant portion of the evidentiary record was devoted to the examination of these contentions.

The issues of cost and reliability are irrelevant to the determination of service territory boundaries, which are based upon a statutory standard of "the service territories actually served on July 1, 1997, and following to the extent possible municipal boundaries," and which makes no

mention either of cost or reliability. G.L. c. 164, § 1B(a). For its part, WMLP, at least, appears to concede (see WMLP Initial Brief at 21-29) that these issues are really relevant only if Olin were a “straddling” customer with a right to choose its competitive supplier (which Olin is not), and neither party appears to argue directly, or with any force, that the Department should decide service territory boundaries based upon these issues.<sup>13</sup>

That said, and understanding that is probably all that needs to be said about these issues from a legal standpoint, Boston Edison has a number of strong disagreements with the factual assertions that underlie the claims put forward by Olin and WMLP. On the issue of comparing interconnection costs, the proposed interconnection of Olin to WMLP has moved from place to place as the case has proceeded and new information has emerged continuously (Tr. 1, at 38-39). The potential interconnection with Boston Edison, based on five options initially presented at a meeting in June 2001, has been revealed to be based upon inaccurate assumptions, either provided by Olin or reasonably presumed by the Company (in the absence of information to the contrary from Olin), regarding Olin’s planned loads, switchgear location, and ostensible redundancy requirements (Exhs. BE-ARJ-1, at 8-13; BE-ARJ-2; Tr. 5, at 815).

The record in this case, as extensive it is, does not go even a fraction of the way to fully exploring each of these issues, including such things as the underlying basis of the rates for a municipal utility versus an electric company,<sup>14</sup> the differing interconnection policies for the two

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<sup>13</sup> The closest Olin came to making this claim was during the cross examination of Mr. Hannabury where he stated: “I would assume that the Department might take these into consideration. I don’t know how important they would be, or if they would be taken into consideration at all; but they may” (Tr. 2, at 148). Despite Mr. Hannabury’s testimony, neither Olin nor WMLP argue on brief that cost and reliability are essential considerations in franchise border disputes.

<sup>14</sup> For example, what mandatory charges, such as the transition charge, or energy efficiency and renewables charges, are included in electric company rates, and what cost elements, such as property taxes, may not be included in municipal rates? Similarly, with regard to any charges that might from time to time be imposed pursuant to G.L. c. 166, § 22M regarding municipal undergrounding of lines, could an entity like Olin be able to evade cost responsibility altogether were its position to be accepted?

entities,<sup>15</sup> and the overall set of circumstances and policies that determine why a particular community, or set of customers, receives underground service while other communities or customers are served through predominantly overhead service.<sup>16</sup> The fact is that Boston Edison provides reliable service at a reasonable cost pursuant to Department-approved tariffs and terms and conditions to all of its customers throughout its service territory, including Needham. Boston Edison has no option to do otherwise, and any customer that thinks this is not the case has ample avenues to bring such issues before the Department. Boston Edison does not doubt that WMLP's objective in Wellesley is also to provide cost-effective, reliable service to its customers. What is clear is that the service territory boundary between Boston Edison and WMLP, determined in accordance with G.L. c. 164, § 1B(a), does not move about based upon individual customer's perceptions of the relative cost and reliability of the two neighboring systems.

Accordingly, Boston Edison submits that Olin's and WMLP's cost and reliability assertions are not relevant to the Department's determination of franchise rights in this case.

### III. CONCLUSION

For all of the foregoing reasons, Boston Edison has demonstrated that WMLP has never "actually served" Lot 2 and, therefore, this portion of Needham is not part of WMLP's service territory pursuant to G.L. c. 164, § 1B(a). Moreover, even if the prior service to some light poles

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<sup>15</sup> Including, for example, questions regarding WMLP's construction of a dedicated underground circuit right to its municipal boundary with up to 4 MW of excess capacity, which capacity it then offers with no interconnection charge to prospective new customers in a neighboring community (with the cost ostensibly allocated to other customers on its system). Interconnection with Boston Edison would also be free to a new customer if its Department-approved line extension terms and conditions were different and it followed a similar policy.

<sup>16</sup> Given that it appears that underground circuits are apparently subject to fewer outages per mile, does this mean that customers served by overhead circuits are entitled to request service by underground circuits (without any payment of associated costs) or that they are otherwise recipients of "unreliable" service?

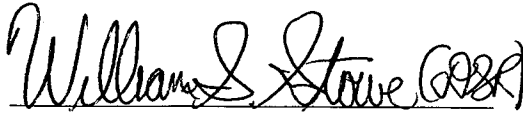
formerly located on Lot 2 could be considered actual service, that prior service was so small, geographically limited, and of such a different character that it cannot support the service Olin currently receives on Lot 2. In addition, the arguments presented by Olin and WMLP relative to cost and reliability are predicated on misstatements of the record and are totally irrelevant to the legal issues in determining service territory boundaries.

Further, in this case, Boston Edison has demonstrated that it has an exclusive franchise right to serve electricity customers in Needham, pursuant to G.L. c. 164, § 1B(a), and that Olin is located exclusively in Needham. The arguments presented by Olin and WMLP relative to Olin's relationship with Babson, future buildings that Olin and Babson may jointly own, and certain prior service arrangements along the Needham-Wellesley border do not support their claim. Therefore, the Department should not deviate from municipal boundaries in determining the respective service territories of Boston Edison and WMLP in this case. Accordingly, Boston Edison respectfully submits that the Department should deny Olin the relief requested in its Petition and determine that Olin is an electricity customer properly served by the Company.

Respectfully Submitted,

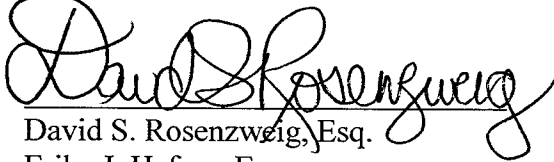
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Dated: May 13, 2002

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